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Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

CR-21-0337

Gary Wayne Morgan, Jr.

v.

State of Alabama

Appeal from Walker Circuit Court
(CC-03-297.62)

COLE, Judge.

Gary Wayne Morgan, Jr., appeals the Walker Circuit Court's summary dismissal of his third Rule 32, Ala. R. Crim. P., petition for postconviction relief, in which he alleged that he was deprived of counsel during critical stages of his criminal prosecution.

Facts and Procedural History

In June 2006, Morgan was convicted of first-degree rape, a violation of § 13A-6-61, Ala. Code 1975, and was sentenced to life imprisonment. This Court affirmed Morgan's conviction and sentence on direct appeal in an unpublished memorandum issued on February 23, 2007, see Morgan v. State (No. CR-05-1906, Feb. 23, 2007), 4 So. 3d 587 (Ala. Crim. App. 2007) (table), and it issued a certificate of judgment on May 11, 2007.¹ On March 19, 2019, Morgan filed the instant petition.

In his petition, Morgan alleged that the circuit court was without jurisdiction to render a judgment or to impose a sentence in his case because, he said, he "was deprived of counsel during critical stages of the proceedings." (C. 17.) According to Morgan, on April 10, 2002, the district court appointed Katrina Ross to represent him, and Ross told him "that she had no experience in this type of case and would not be willing to represent him beyond the district court." (C. 17.) Morgan alleged that he then "hired" Wendy Williams and Cynthia Umstead to represent him,

¹This Court takes judicial notice of the record filed with this Court in CR-05-1906. See, e.g., Doster v. State, [Ms. CR-20-0300, December 17, 2021] ___ So. 3d ___, ___ n.1 (Ala. Crim. App. 2021) ("This Court may take judicial notice of its own records.").

and they entered notices of appearance on May 9, 2002. Morgan claimed that, on June 25, 2002, he was indicted for second-degree rape, and that Ross withdrew from his case the next day. Umstead and Williams moved to withdraw from his case on July 24, 2002, because Morgan had never paid them, but the circuit court denied their motion. So Umstead and Williams remained as Morgan's counsel. On November 5, 2002, however, Umstead and Williams again moved to withdraw from Morgan's case, and the circuit court granted their motion on November 15, 2002. New counsel was not appointed for Morgan.

Morgan alleged that, in January 2003, he received notice that his case was set for trial in February 2003. Morgan claimed that, at that point, he telephoned the circuit judge, who told him that the court would not appoint him an attorney and that he would have to hire his own. Morgan said that he then filed a motion for the court to appoint a public defender for him, and the circuit court denied his motion. According to Morgan, on February 21, 2003, he appeared before the circuit court "at the first call for [his] trial" and the circuit court read his indictment, asked if he understood what he was charged with, and introduced him to the assistant district attorney assigned to his case. (C. 32.) Morgan said

that the assistant district attorney made him an offer to enter a guilty plea, and the circuit court continued his trial to give him time to consider the State's offer. Morgan said that he telephoned the assistant district attorney "immediately" and she explained the offer to him. Later, Morgan again called the assistant district attorney and "explained to her, start to finish, everything that had happened leading up to [his] arrest," and he said that he "fully explained the situation and [he] answered all of her questions fully and honestly," all without the benefit of counsel. (C. 32-33.)

Morgan said that, on March 14, 2003, he again appeared in the circuit court without counsel and was told that a different assistant district attorney would be handling his case, and that, after that hearing, Morgan met with the new assistant district attorney, who made him a different plea offer. On May 7, 2003, however, the grand jury returned a superseding indictment against him charging him with first-degree rape. On June 3, 2003, the State moved the circuit court to appoint counsel for Morgan; the court granted that motion on June 13, 2003, appointing Byron McMath as his new counsel that same day.

In sum, Morgan alleged that he "was completely deprived of his right to counsel from November 15th, 2002, until June 13th, 2003. For seven (7) months [he], twenty years of age at the time, was left wholly without legal assistance." (C. 19.) Morgan said he "had no attorney to investigate the circumstances of his case, protect his rights, advise him, or defend him from the highly trained and experienced prosecution." (C. 19.) Morgan claimed that there were "several critical stages" during those seven months, including: "[a] crucial period for investigation of the facts and circumstances of the case, interviewing of witnesses, and preservation of important evidence; arraignment; conversations with the prosecutor; reindictment on a higher charge; and the reception of three (3) separate plea offers." (C. 19.)

On October 1, 2019, without waiting for a response from the State, without granting Morgan's request to proceed in forma pauperis, and without Morgan paying a filing fee, the circuit court issued an order dismissing Morgan's petition. Morgan appealed.

On August 6, 2020, this Court issued an order dismissing Morgan's appeal because the circuit court did not have jurisdiction to rule on Morgan's petition as it had not granted Morgan's request to proceed in

forma pauperis and Morgan had not paid a filing fee. See Morgan v. State, [No. CR-19-0125, Aug. 6, 2020] 339 So. 3d 263 (Ala. Crim. App. 2020) (table). This Court's order explained that Morgan's Rule 32 petition was still pending in the circuit court awaiting disposition.

Thereafter, on November 7, 2020, the circuit court granted Morgan's request to proceed in forma pauperis. On December 10, 2021, after being granted extensions of time by the circuit court, the State moved to dismiss Morgan's petition. In its motion to dismiss, the State argued that Morgan's claim, although jurisdictional, was not pleaded with the specificity required under Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P. The State also argued that Morgan's claim was refuted by the record and was without merit because:

"[Morgan] was clearly represented by legal counsel in the course of legal proceedings. Review of the court records in DC-2002-710 and CC-2003-297 indicate that eight (8) different attorneys represented [Morgan]. They are as follows: 1 - Katrina Ross; 2 - Wendy Williams; 3 - Cynthia Umstead; 4 - Byron McMath (Document 8); 5 - Doug Farris (Documents 9 and 15); 6 - Allen Meighen, Jr. (Document 17); 7 - Mark Turner (Documents 20 and 41); and 8 - John Stokesberry (Document 49 - appeal attorney). The court records also indicate that [Morgan] failed to cooperate and/or refused to take advice from his attorneys thereby creating a conflict in the attorney-client relationship and resulting in [Morgan] terminating counsel and again requesting newly appointed representation.

"[Morgan] was represented by Allen Meighen during much of the pretrial proceedings until the termination of legal services by [Morgan]. [Morgan] was then appointed attorney Mark Turner for the remaining pretrial proceedings and trial. Accordingly, in efforts to safeguard [Morgan's] constitutional rights and effective assistance of counsel, the court requested Allen Meighen remain for trial proceedings in the event he was needed to assist. Following the trial, attorney John Stokesberry was appointed to represent [Morgan] on his direct appeal.

"For the Court to allow this petition as anything more than a weak attempt of a constitutional violation of a Sixth Amendment right would be a great injustice in the legal system and would only serve to circumvent the rules of law. The claim is refuted by the record and without merit."

(C. 117.) On December 15, 2021, the circuit court summarily dismissed Morgan's petition. This appeal follows.

Discussion

On appeal, Morgan argues, among other things, that the circuit court erred when it summarily dismissed his petition "when [he] had met [the] burden of pleading and was entitled to an evidentiary hearing." We agree.²

²Morgan also argues that the circuit court erred "by failing to grant [him] relief to which he is legally entitled" and "by dismissing [his] petition, by failing to address merits, and by failing to specify grounds for dismissal." (Morgan's brief, p. 2.) Because this Court reverses the circuit court's judgment dismissing Morgan's petition and remands this case to

To start, Morgan's claims that he was not represented by counsel from "November 15th, 2002, until June 13th, 2003"; that he asked the circuit court to appoint him counsel during that time; and that, during that uncounseled time, he engaged in plea negotiations with the State, which included his having uncounseled conversations with an assistant district attorney, in which he "explained to her, start to finish, everything that had happened leading up to [his] arrest" and "fully explained the situation and [he] answered all of her questions fully and honestly" (C. 32-33), are jurisdictional claims. See, e.g., Ex parte Pritchett, 117 So. 3d 356, 358 (Ala. 2012) ("A criminal defendant has a right to counsel at any 'critical stage' in the proceedings in which he or she is prosecuted and sentenced, e.g., United States v. Wade, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), that is, at any stage at which a substantial right of the accused may be affected, Mempa v. Rhay, 389 U.S. 128, 134, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). 'If the accused ... is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment [to the United States

the circuit court to conduct an evidentiary hearing on Morgan's claim, this Court does not reach the other arguments that Morgan raised.

Constitution] stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty.' Johnson v. Zerbst, 304 U.S. 458, 468, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)."). Thus, Morgan's claim is not subject to the grounds of preclusion set out in Rule 32.2, Ala. R. Crim. P. Of course, the State, in its motion to dismiss, conceded that Morgan's claim is jurisdictional, but it argued that Morgan's claim was insufficiently pleaded and was without merit. On appeal, the State maintains that the circuit court properly dismissed Morgan's claim because it was insufficiently pleaded and without merit.

A Rule 32 petitioner's burden of pleading a claim in a Rule 32 petition is well settled:

"Rule 32.3 states that '[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' Rule 32.6(b) states that '[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.' As this Court noted in Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003):

""Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief." Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion "which, if true, entitle[s]

the petitioner to relief." Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of facts in pleading which, if true, entitle[s] a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts.'

"913 So. 2d at 1125. The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003)."

Hyde v. State, 950 So. 2d 344, 355-56 (Ala. Crim. App. 2006). Morgan satisfied his heavy burden in this case.

As set out above, Morgan alleged that the circuit court violated his right to counsel during a critical stage of the proceedings against him -- a jurisdictional claim -- when it allowed Umstead and Williams to withdraw from his case and did not appoint new counsel for him for approximately seven months. Morgan claimed that, during that seven-month period, he appeared before the circuit court for a trial setting, was involved in plea negotiations with the State (during which he was

questioned by an assistant district attorney about the facts of his case and spoke freely with the assistant district attorney), and, after engaging in plea negotiations with the State, the grand jury returned a superseding indictment charging Morgan with first-degree rape. Although the State responded to Morgan's petition, it did not refute his allegation that he was uncounseled for a seven-month period during critical stages of his criminal proceeding. See Chaverst v. State, 517 So. 2d 643, 644 (Ala. Crim. App. 1987) (holding that when the State fails to respond to a petition for postconviction relief, those facts identified by the petition must be taken as true). Accordingly, we must accept Morgan's unrefuted facts as true, and his facts, if true, would entitle him to relief. Accordingly, Morgan satisfied his burden of pleading, and the circuit court erred when it dismissed Morgan's petition without giving him an opportunity to prove his claim at an evidentiary hearing. See Johnson v. State, 835 So. 2d 1077, 1080 (Ala. Crim. App. 2001) (explaining that, "when a petition contains matters which, if true, would entitle the petitioner to relief, an evidentiary hearing must be held").

Conclusion

Based on the foregoing, we remand this case to the circuit court for that court to conduct an evidentiary hearing pursuant to Rule 32.9(a), Ala. R. Crim. P., giving Morgan an opportunity to prove his claim that he was not represented by counsel during a critical stage of the proceedings against him. The court is further instructed to take any necessary action as a consequence of the evidentiary hearing. On remand, the circuit court shall take all necessary action to ensure that the transcript of the evidentiary hearing, its findings of fact, and any subsequent action be returned to this Court within 90 days from the date of this opinion.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum, McCool, and Minor, JJ., concur.